

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-208

WESLEY JAMES SAWNEY, JR.,
APPELLANT

V.

STATE OF ARKANSAS,
APPELLEE

Opinion Delivered NOVEMBER 12, 2008

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CR-2007-1151-1]

HONORABLE WILLIAM A. STOREY,
JUDGE,

AFFIRMED

KAREN R. BAKER, Judge

A Washington County jury convicted appellant Wesley James Sawney, Jr., of being an accomplice to aggravated robbery, arson, and theft of property. The jury also found that appellant used a firearm in the commission of a felony. He was sentenced to ten years' imprisonment for aggravated robbery, one year for arson, and five years for theft of property, to run consecutively. The seven-year firearm sentence was imposed concurrently. Appellant challenges his convictions by asserting that the trial court erred in denying his motion for a directed verdict. We find no error and affirm.

Evidence at trial established the following facts. On April 13, 2007, at approximately 9:30 in the morning, the Arkansas National Bank in Springdale, Arkansas was robbed. One individual perpetrated the robbery. The robber entered the bank carrying a green backpack and wearing red and black gloves. The robber was also wearing a white motorcycle helmet

that obscured the robber's facial features. The robber approached the clerk's window without removing the helmet while saying that he wanted to make a deposit. Based upon the tenor of the voice and the clerk's observations of the robber's physical characteristics, the teller identified the robber as male.

When the robber reached the clerk's window, he placed the backpack on the counter causing a clanging noise. He retrieved a semi-automatic pistol from the backpack and pointed it at the bank clerk, directed the clerk to give him all the money, then left after the clerk complied. The clerk described the barrel of the gun as black in color and a rectangular shape. The bank teller stationed at the drive-through window also heard the robber's demand for money.

An eye-witness testified that he was driving outside the bank when he saw a person walking up to the front of the bank with a backpack and with a white motorcycle helmet on his head. The witness explained that it struck him as odd that someone would be entering the bank with a helmet on his head, so he came back to the bank. He observed a red Jeep Cherokee parked behind the bank building with an individual sitting in the Jeep. This person also was wearing a white motorcycle helmet, and the passenger door of the Jeep was open. The witness stated that he turned his vehicle around in order to view the license plate number of the Jeep; however, before he could gain the vantage point, the Jeep sped off.

Detective Eric Gregory with the Springdale Police Department testified that shortly after he began documenting the scene of the robbery, he received a call that a red Jeep was found burning just outside the city limits in Washington County's jurisdiction. A witness had

already identified a red Jeep as the vehicle used by the suspects in the robbery. Despite the fire, the VIN of the vehicle was retrieved which lead the investigators to the registered owner, Tony King. Mr. King, who was incarcerated in a facility in Malvern at the time, stated he had given the vehicle to his ex-wife. Tracing the vehicle through several transactions, the officers obtained a warrant for the residence of Chris Miller. The search pursuant to the warrant produced no evidence of the robbery. In addition, after interviewing Mr. Miller, it was determined that, not only did Mr. Miller not physically match the description of the suspect, but Mr. Miller's employer as well as video surveillance on the employer's premises confirmed that Mr. Miller was working at the time of the robbery. In the course of investigating the possession and location of the Jeep prior to the robbery, the investigators were told by more than one source that people were saying that the Sawney brothers had taken it.

Detective Gregory also described a receipt for two motorcycle helmets that were purchased on April 12, the day before the robbery at 3:36 in the morning at a Wal-Mart. He also explained that the FBI confirmed that the purchased helmets were consistent with the ones used in the robbery. Special Agent Perry Wilson with the FBI based in Fayetteville explained that surveillance video at the Wal-Mart store showed that appellant purchased the helmets.

Testimony also indicated that appellant's uncle confirmed that appellant and his brother stored a red Jeep at his shop for three to four weeks, but that, the night before the robbery, the Jeep had disappeared from the shop. The uncle had written down the VIN of the Jeep

while it was stored there, and this number matched the VIN of the red Jeep set on fire shortly after the robbery.

Detective Charles Rexford with the Washington County Sheriff's office investigated the fire involving the red Jeep. He noted the odor of accelerants on the vehicle, which test results from the crime lab confirmed were present. The detective testified that he was specifically looking for items associated with the robbery, but found nothing of substance in the vehicle to connect the red Jeep with the bank robbery.

Items consistent with the robbery, however, were found in appellant's car. Lieutenant Lester Coger with the Springdale Police Department described the search of the car belonging to appellant and his wife. The search revealed a semi-automatic handgun with a square nose. He explained that when he saw this handgun, he recalled the description provided by the bank clerk of the gun that the robber pointed at her and recognized that this weapon was consistent with her description. The lieutenant found this consistency significant, reasoning that people who have had a gun pointed at them often remember the details of the barrel and the nose of the gun. He further testified that documentation discovered in the search identified where the gun was purchased, when the gun was purchased, and by whom it was purchased. The signature of the purchaser was that of appellant.

In the trunk of appellant's vehicle, Lieutenant Coger found two motorcycle helmets, the buyer's guide to the red Jeep with the matching VIN written on the guide, and a gas can with a nozzle that had been burned to the point of breaking. This gas can was admitted into evidence and the disformity of the container, apparently caused by exposure to heat and flame,

was discussed and explained to the jury.

Another witness, Ryan Plaster, testified regarding statements made by appellant and appellant's brother, who was the best man in Mr. Plaster's wedding. He described how the police had shown Mr. Plaster a video of the robbery and that following that viewing, the two brothers had come to his place of employment. Appellant stood behind Mr. Plaster with appellant's brother in front. Mr. Plaster stated he felt intimidated by the two men and that appellant told him that he needed to stay quiet about the robbery. At one point, they escorted him to a vehicle to show him motorcycle helmets, and when they popped the trunk he believed they were going to try to hit him and throw him into the trunk. He also testified that appellant's brother, in the presence of the appellant, commented that he had burned all the physical evidence.¹

When a theory of accomplice liability is implicated, we affirm a sufficiency-of-the-evidence challenge if substantial evidence exists to show that the defendant acted as an accomplice in the commission of the alleged offense. *See Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006). Our supreme court has explained that there is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Id.* When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* One cannot disclaim accomplice

¹In a footnote in its brief, the State states that appellant did not abstract the testimony of Special Agent Perry Wilson, or the testimony of Ryan Plaster, and has only partially abstracted the testimony of Detective Eric Gregory and Lieutenant Lester Coger. The State then cites *Robinson v. State*, 49 Ark. App. 58, 60, 896 S.W.2d 442, 443 (1995), stating that the Court, of course, may go to the record to affirm.

liability simply because he or she did not personally take part in every act that went to make up the crime as a whole. *Id.*

Our supreme court has repeatedly held that, in reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *See id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Epps v. State*, 100 Ark. App. 344, --- S.W.3d ---- (2007). The credibility of witnesses is an issue for the jury and not the court. *Bell v. State*, 371 Ark. 375, --- S.W.3d --- (2007). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Appellant was convicted of being an accomplice to aggravated robbery, arson, and theft of property, and that he had used a firearm in the commission of the felony. Arkansas Code Annotated section 5-2-403(a) (Repl.1993) provides that a person is an accomplice of another person in the commission of an offense if, with the requisite intent, he aids, agrees to aid, or attempts to aid the other person in the commission of the offense. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). Under the accomplice liability statute, a defendant may properly be found guilty not only for his own conduct, but also for the conduct of his accomplice. *Id.* In a case based upon circumstantial evidence, relevant circumstances include the presence of

an accused in proximity to the crime, opportunity, association with persons involved in a manner suggesting joint participation, and possession of instruments used in the commission of the offense. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

Our supreme court has specifically stated that “an element to be proved in every case is that the person who stands before the court in the position of the defendant is the one whom the indictment or information accuses and to whom the evidence is supposed to relate.” *Womack v. State*, 301 Ark. 193, 198, 783 S.W.2d 33, 36 (1990). However, a specific in-court identification is not required and the identification of a defendant can be inferred from all the facts and circumstances that are in evidence. *Id.*

Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant’s guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness’s testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* The jury is the proper body to determine what the circumstances revealed. See *Jefferson v. State*, 86 Ark. App. 325, 185 S.W.3d 114 (2004).

A defendant’s improbable explanation of suspicious circumstances may be admissible as proof of guilt. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004). One eyewitness’s testimony is sufficient to sustain a conviction, and his testimony is not clearly unbelievable simply because it is uncorroborated or because it has been impeached. *Williams v. State*, 351

Ark. 215, 91 S.W.3d 54 (2002).

A criminal defendant's intent is seldom proved by direct evidence and must normally be proved from the circumstances of the crime, and a jury is allowed to draw upon its common sense to infer intent from the circumstances. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). Because of the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

In the present case, appellant argues that while testimony provided at trial pointed to appellant's brother as the individual who committed the alleged crimes, the testimony also established that his brother lived with appellant and as a resident of appellant's home had access to all of appellant's property. He asserts that the circumstantial evidence which purportedly leads to appellant actually leads to him only by virtue of his living situation.²

Appellant urges us to find that the circumstantial evidence in this case cannot support a conviction because the fact that his brother lived with him provides other reasonable conclusions inconsistent with his guilt. *See Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225

²Given the testimony missing from the abstract, we understand appellant's assertion. In *Robinson, supra*, this court emphasized that the record on appeal is confined to that which is abstracted, and failure to abstract those portions of the record relevant to the points on appeal precludes this Court from considering those issues. *Id.* However, we may go to the record to affirm. *Id.* The case before us does not involve a sentence of death or life imprisonment that would impose a heightened duty upon the Attorney General regarding the abstracting of this record pursuant to Rule 4-3(h) of the Rules of Supreme Court; however, Rule 4-3(c) clearly directs that appellee shall have thirty days from the filing of the appellant's brief to file the brief "and such further abstract and Addendum as may be necessary to a fair determination of the case." The strong public interest in upholding jury verdicts supports the better practice for the State to supplement the abstract when crucial testimony is missing from appellant's brief.

(2000) (holding that the circumstantial evidence can provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion).

Appellant fervently argues that no testimony sufficiently identified him as the driver of the red Jeep, that there were no eye-witnesses to the starting of the fire of the Jeep, that Detective Gregory failed to investigate a report of another individual not matching appellant's description seen driving a red Jeep in the area where the Jeep was found burned, and that there was insufficient evidence that the gun used in the robbery was the gun found in appellant's vehicle.

We agree with appellant that most of the circumstantial evidence could lead to him by virtue of his living arrangement to his brother; however, the testimony of Mr. Plaster provides a critical basis to support the conviction and demonstrates that the evidence is consistent with appellant's guilt and inconsistent with any other reasonable conclusion. Appellant's brother was Mr. Plaster's best man at his wedding, and the jury was free to use their common knowledge to draw conclusions from that fact about their relationships, how well Mr. Plaster would interpret the brothers' actions toward him, and other issues of credibility. *See Bailey v. McRoy*, 99 Ark. App. 185, 190, 258 S.W.3d 388, 392 (2007). The testimony describing appellant's presence during his brother's confession of destroying the evidence by fire, Mr. Plaster's feelings of fear and intimidation with appellant standing behind him, and appellant's admonition to Mr. Plaster that he should be quiet relating to Mr. Plaster's conversations with the police establish a nexus sufficient to support the jury's determination that the circumstances

revealed appellant's role as an accomplice. See *Jefferson v. State*, 86 Ark. App. 325, 185 S.W.3d 114 (2004). When that connection is made, all of the evidence is consistent with appellant's guilt and inconsistent with any other reasonable conclusion.

Accordingly, we affirm.

PITTMAN, C.J., and HUNT, J., agree.